BEFORE THE
CALIFORNIA HORSE RACING BOARD
STATE OF CALIFORNIA

In the Matter of the: Appeal from Board of Stewards Order To Forfeit Purse Award, Dated April 17, 1998 RICHARD GACH, Appellant.	No. SAC 99-021 OAH No. N 1999100432

PROPOSED DECISION

This matter was heard before Administrative Law Judge Jonathan Lew, State of California, Office of Administrative Hearings, on December 7, 1999, in Oakland, California.

Mark D. Johnson, Deputy Attorney General, represented the California Horse Racing Board.

Appellant Richard Gach was represented by David M. Shell, Esq., 8788 Elk Grove Boulevard, Building 2, Suite F, Elk Grove, California 95624.

Submission of the matter was deferred pending receipt of additional written argument. The Opening Brief of the California Horse Racing Board was received on December 20, 1999, and marked as Exhibit A for identification. Appellant's Reply Brief was received on January 3, 2000, and marked as Exhibit 3 for identification. The case was submitted for decision on January 3, 2000.

PROCEDURAL HISTORY

1. By letter dated April 17, 1999 the California Horse Racing Board, Board of Stewards sent Richard Gach (appellant) an Owners Notification of Purse Forfeiture. The letter states:

> Following the running of the 3rd race on November 5, 1998, at Bay Meadows Race Course, San Mateo, CA your horse, "Governor Elect", tested positive for the presence of the prohibited drug substance, Clenbuterol. Accordingly, the purse, $5,367.15 earned by your horse is hereby forfeited, by order of the California Horse Racing Board (CHRB), Board of Stewards; pursuant to Board rule 1859.5 "Disqualification Upon Positive Test".
>
> Attached is a copy of the initial confirmation from Truesdail Laboratories, of the original test findings, and a copy of the split sample test findings from Michigan Department of Agriculture.
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> The forfeiture is effective ten (10) days from the date of this notice. Your right to appeal to the CHRB, and seek a stay pending an appeal, is set forth in the CHRB Rules and Regulations, section #1761 and #1762. Appeal must be made within seventy-two (72) hours, from the receipt of this notice.
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> The granting of a stay of the Stewards decision is contingent upon your agreement to deposit the above referenced purse, $5,367.15 into an escrow account, with the paymaster of purses.

2. By letter dated April 20, 1999, appellant requested that an appeal hearing be held.

3. In making its purse forfeiture order the Board of Stewards relied solely upon the test reports/findings received from Truesdail Laboratories, Inc. and the Michigan Department of Agriculture, Laboratory Division. It did not hold an adjudicatory hearing. Thus, appellant was provided no notice and was not afforded an evidentiary hearing in which he could challenge the adequacy of the laboratory test results, to object to evidence relied upon by the Board of Stewards, to cross-examine witnesses or to raise other matters by way of defense. The Board of Stewards issued no written decision other than the "OWNERS NOTIFICATION OF PURSE FORFEITURE," the full terms of which are set forth in paragraph 1.

LEGAL CONCLUSIONS

1. The Board of Stewards maintains that there is neither a statutory nor a constitutional requirement that it hold an evidentiary hearing before ordering forfeiture of a purse. It believes that the Business and Professions Code gives the Board of Stewards the discretion to summarily order purse forfeiture without a hearing upon a test positive for a prohibited drug substance in a post race sample. Appellant argues instead

that in equine medication cases, the Stewards are required to adjudicate the finding of a positive test and that such would require the taking of evidence and the determination of facts.

Business and Professions Code section 19582.5 provides the authority for ordering purse forfeiture. It reads:

> The board may adopt regulations that prohibit the entry in a race of a horse that tests positive for a drug substance in violation of Section 19581. Upon a finding of a prohibited drug substance in an official test sample, a horse may be summarily disqualified from the race in connection with which the drug sample was taken. Upon disqualification of a horse pursuant to these regulations, any purse, prize, award, or record for that race shall be forfeited.

2. The CHRB adopted rule 1859.5 relating to disqualification upon positive test finding, and this regulation provides:

> A finding by the stewards that an official test sample from a horse participating in any race contained a prohibited drug substance as defined in this article, and which is determined to be in class levels 1-3 as established in Rule 1843.2 of this article, unless a split sample tested by the owner or trainer pursuant to Rule 1859.25, fails to confirm the presence of a prohibited drug substance determined to be in class levels 1-3 shall require disqualification of the horse from the race in which it participated and forfeiture of any purse, award, prize or record for such race and the horse shall be deemed unplaced in that race. Disqualification shall occur regardless of culpability for the condition of the horse.

(Cal. Code Regs., tit. 4, § 1859.5.)

3. Appellant argues that in order for the stewards to make a "finding" as that term is used above in Rule 1859.5 and section 19582.5 of the Business and Professions Code, there must be an evidentiary hearing. In support he points to Rule 1843.2 governing classification of drug substances which provides in pertinent part:

> The Stewards *when adjudicating a hearing for the finding of a drug substance(s)* in a test sample taken from a horse participating in a race, shall consider the classification level of the substance as established ….

(Emphasis added. Cal. Code Regs., tit. 4, § 1843.2.)

Appellant contends that in the context of these provisions of law and regulation, the "finding" referenced may be made only after a hearing where evidence is presented and where the appealing party has the opportunity to confront witnesses, object to evidence, challenge the adequacy of the laboratory tests and to raise other matters by way of defense. The official laboratory, he argues, is not authorized by the law or regulations to make such findings.

4. Appellant also points out that Business and Professions Code section 19582.5 relating to purse forfeiture makes direct reference to, and must therefore incorporate a separate violation of section 19581. Section 19581 provides in part:

> No substance of any kind shall be administered by any means to a horse after it has been entered to race in a horserace, unless the board has, by regulation, specifically authorized the use of the substance and the quantity and composition thereof.

(Bus. & Prof. Code, § 19581.)

Under Rule 1843.5 a horse is deemed to be "entered" in a race 48 hours before post time of the running of such race. (Cal. Code Regs., tit. 4, § 1843.5(a).) Because section 19581 of the Business and Professions Code deals with administration of a drug to a horse "after it has been entered to race," appellant argues that the stewards simply cannot find a violation of this section without holding an evidentiary hearing to determine whether the drug was administered after the horse was entered to race.

5. By reason of the above appellant contends that the agency is required to hold an adjudicatory hearing on all equine medication violations. To hold otherwise, he argues, would result in two separate schemes by which stewards consider section 19581 violations. For example, under section 19582, the Stewards would be required to hold an evidentiary hearing prior to imposing punishments ranging from monetary penalties to permanent revocation of a person's license.[1] Yet under section 19582.5, the same section 19581 violation would not give rise to an evidentiary hearing if the Stewards were permitted to summarily disqualify a horse and order the purse forfeited without affording appellant notice or an opportunity to be heard. In short, appellant asks, how can CHRB justify holding an evidentiary hearing under section 19582, but not under section 19582.5, where both sections are triggered by a violation of section 19581?

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[1] Business and Professions Code section 19582 provides in pertinent part:

> "(a) Violations of Section 19581, as determined by the board, are punishable as set forth in regulations adopted by the board. The board shall classify violations of Section 19581 based upon each class of prohibited drug substances, prior violations within the previous three years, and prior violations within the violator's lifetime. …"

6. In *Lavin* v. *California Horse Racing Board* (1997) 57 Cal.App.4th 263, the California Court of Appeal considered whether section 19582.5 requires a hearing prior to disqualification of a horse and purse forfeiture. The issue before the appellate court was whether CHRB Rule 1859.5, mandating disqualification of a horse and forfeiture of any purse where there is a finding that the horse ran with drugs in its system, conflicted with section 19582.5 of the Business and Professions Code which contains a discretionary disqualification provision. The court held that CHRB was well within the scope of its delegated authority when it adopted a summary penalty rule rather than a case-by-case rule of determination. (At p. 269.) And that the language of section 19582.5 does not imply, suggest or require the CHRB to engage in an exercise of choice between disqualification and some lesser penalty. (At p. 270.) There was therefore no conflict between the two provisions. The court recognized that the CHRB had the power to enact a no tolerance rule, especially since a plain reading of section 19582.5 provided that a horse "may be summarily disqualified." (*Ibid.*)

7. Important to this case is the *Lavin* court's elaboration of the type of due process required in summary disqualification/purse forfeiture cases:

> Rule 1859.5 is not in conflict with the statute in question since a plain reading of "may" be "summarily" disqualified informs the reader that the CHRB is invested with the option to disqualify a racehorse summarily <u>without hearing</u>. Clearly, in its discretion, the CHRB may elect to impose the disqualification penalty repeatedly. A declaration of ineligibility in every instance of violation does not mean that discretion has not been exercised. It means only that the CHRB has made the decision, within its discretionary an plenary powers, that a general rule of blanket disqualification is the most effective statutory implement to accomplish its objective of allowing only drug-free horses to race. A rule which pronounces unequivocally that any contaminated horse will not be permitted to win a race is consistent with the CHRB's responsibility to protect the integrity of the sport of horse racing and is, therefore, not unreasonable.
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> . . . .
>
> <u>The Legislature would have included language in the statute ensuring that a hearing and findings precede any disqualification and forfeiture, had that been its intent.</u>

(*Id*. at pp. 270-271; emphasis added.)

8. *Lavin* establishes that there is no statutory requirement that an evidentiary hearing be held or formal findings made before purse forfeiture is ordered.

9. The underlying administrative proceedings in *Lavin* included actions against the trainers for each of the horses, alleging violations of CHRB rules. The CHRB found that the prohibited drug, scopolamine, was not "administered to the horse" within the meaning of CHRB rules because the trainers and their employees were unaware that the bedding straw was contaminated with jimsonweed, a native grain plant which is a natural source of scopolamine. (*Id.* at p. 266.) The trainers were exonerated, but the disqualification of the horses and forfeiture of the purses pursuant to Rule 1859.5 was still affirmed. (*Ibid.*)

It appears then that issues of culpability are properly considered with respect to the manner in which the drug entered the horse's system only in proceedings against individuals such as trainers who are subject to disciplinary action.[2] Action taken against individuals under section 19582 of the Business and Professions Code would come only after an administrative hearing. In direct contrast is section 19582.5 allowing for summary disqualification and purse forfeiture without a hearing. Even when no culpability is established, as was the case in *Lavin*, summary disqualification and purse forfeiture is proper whenever a horse tests positive for an offending drug. It flows from CHRB's responsibility to protect the integrity of racing and by its decision to essentially adopt a no tolerance rule for horses testing positive for prohibited drugs.

Viewed in this context, requiring an evidentiary hearing for individuals facing disciplinary action, but not for an owner facing disqualification and purse forfeiture, is reasonable. The dual and seemingly inconsistent approaches complained of by appellant that are taken for the same underlying section 19581 violation (but under separate sections 19582 and 19582.5) make sense. Different personal/property interests are being implicated, and different policy goals are being advanced by CHRB under the separate statutory provisions. (Bus. & Prof. Code, §§ 19582 & 19582.5.)

Constitutional Due Process Considerations

10. Appellant notes that the United States and California Supreme Courts have consistently held that due process attaches to forfeiture cases and that pre-forfeiture

[2] Indirectly, *Lavin* also addresses appellant's contention that a hearing is needed in order to make findings regarding administration of a drug to a horse after it has been entered to race. (Bus. & Prof. Code, § 19581.) The *Lavin* court found that scopolamine was not administered to the horse within the meaning of CHRB rules. Therefore, in holding that CHRB was empowered to order forfeiture upon a positive drug test, it did so without making a separate finding that the prohibited substance had been administered after the horse was entered in the race.

hearings are required except in an emergency situation.[3] The United States Supreme Court in *Board of Regents* v. *Roth* (1972) 408 U.S. 564 has described general attributes of property interests as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it. … Property interests … are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

(*Id.* at p. 577.)

Other cases echo the holding in *Roth* that property interests must rest on rules or understandings from which a legitimate claim to entitlement can be derived.[4]

11. It is the Steward's position that a race horse owner has no claim to a purse until the horse is shown to be drug free. It relies upon a Seventh Circuit Court of Appeals decision that considered a challenge to the constitutionality of the Illinois Racing Board Rules. In *Edelberg* v. *Illinois Racing Board* (7th Cir. 1976) 540 F.2d 279 there was a challenge to the automatic withholding and redistribution of purse money when a winning horse is allegedly drugged before a race. The plaintiff-appellants in that case argued that the redistribution of the prize money among the drug-free horses was a violation of their civil rights because the rule arbitrarily infringed upon their property

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[3] Property interests implicated within the Fourteenth Amendment's protection of liberty and property have been found to exist in mislabeled food supplements seized under a provision of federal Food, Drug, and Cosmetic Act (*Ewing* v. *Mytinger & Casselberry, Inc.* (1950) 339 U.S. 594) and the seizure of household goods subject to repossession to seller (*Fuentes* v. *Shevin* (1972) 407 U.S. 67). California courts have recognized a protectible interest in tangible personal property including property subject to seizure and/or destruction. These cases have included seizure of news racks which violated a city ordinance (*Kash Enterprises* v. *City of Los Angeles* (1977) 19 Cal.3d 294); the seizure of a refrigerator under the state's claim and delivery statute (*Blair* v. *Pritchess* (1971) 5 Cal.3d 258); seizure of a car used to transport narcotics under a civil forfeiture statute (*People* v. *Broad* (1932) 216 Cal. 1); and confiscation of a mental patient's firearms and deadly weapons (*Bryte* v. *City of La Mesa* (1989) 207 Cal.App.3d 687).

[4] See *Bell* v. *Burson* (1971) 402 U.S. 535, 539 (where driver has satisfied state requirement for issuance of a license, driver has property interest in its continued possession); *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 262 (property interest in continued welfare benefits derived from state law defining eligibility); *Goss* v. *Lopez* (1975) 419 U.S. 565, 573 (property interest in public education derived from state law mandating free education for residents).

rights. The *Edelberg* court rejected that argument and concluded that under the Illinois Racing Board rules:

> [P]laintiffs have no legal property right in the purse money until after a laboratory finding that their horse was not drugged. Even if the money has been distributed, the owner's right to possession is conditioned upon a determination that his horse won the race under the established rules.

(*Id*. at p. 284.)

The *Edelberg* court distinguished other horse racing cases in which courts had ruled that due process was violated when the sanction at issue had infringed upon a property right.[5] It noted that those decisions "were premised on the fact that the racing board was imposing a penalty without a hearing and without a determination of fault." (*Id.* at p. 283.) The court explained:

> In the instant case the Board is not attempting to suspend or punish plaintiffs for a violation of its rules. Rather, it is simply attempting to establish an objective and absolute condition that every winning horse must meet before its owner becomes legally entitled to the money in the purse.

(*Id.* at p. 283.)

12. *Edelberg* speaks clearly to the issue of whether there has been a deprivation of due process. The instant appeal arises from a notification to owner of purse forfeiture. There are no issues in this case regarding fines, suspensions or other penalties. Accordingly, no property interest in the purse arose that would entitle appellant to due process protection in the form of notice and a hearing prior to the Board of Stewards action in serving him with the Owners Notification of Purse Forfeiture. In holding that the Illinois rule did not deprive the appellants of a "property right" in the prize money, the *Edelberg* court observed that to the contrary, the rule "protects the property rights of the owners of the horses that do compete fairly, in accordance with the rules and regulations of horse racing." (*Ibid.*) The same can also be said of the application of CHRB Rule 1859.5 in this case.

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[5] The first case was *Suarez* v. *Administrador Del Deporte Hipico de Puerto Rico* (D. Puerto Rico, 1972) 354 F.Supp. 320, which involved a no-fault statute that required purse forfeiture and a six-month suspension from racing for the horse. The second case was *Brennan* v. *Illinois Racing Board* (Ill.1969) 42 Ill.2d 352, where a horse trainer's license was revoked under a statute that made the trainer liable regardless of fault for the condition of the horse.

Review of Stewards' Decision

13. In relying upon *Lavin* and *Edelberg* it should be noted that both cases involved challenges to rules that called for summary disqualification/purse forfeiture regardless of fault, and without a determination of fault. The focus was less on whether the horses were drug free, and more on whether there should first be a hearing to determine fault, or at least to exercise some discretion before imposing disqualification. The broad teaching of *Lavin* and *Edelberg* is that no due process hearing is required where a horse may be summarily disqualified upon a finding that a horse ran with drugs in its system. Yet even in *Edelberg*, the challenged rule provided that a positive laboratory report shall not by itself, be conclusive against the owner of the horse. The accuracy of the laboratory report would be the subject of an investigation and hearing before the Stewards, and only after it was determined that the report was accurate would purse money won be forfeited. (*Edelberg* v. *Illinois Racing Board*, *supra*, 540 F.2d at 281.) Although the *Edelberg* court determined that no property right in the purse money existed, it also considered the fact that laboratory test findings would be the subject of a hearing in determining that there had been no deprivation of procedural due process. (*Id*. at p. 283.)

Under the Illinois rule the horse owners at least "have the opportunity to present their own laboratory report as well as an opportunity to object to the state's laboratory report." (*Id*. at p. 286.) The owners can challenge the technical sufficiency of the report, cross-examine the technician who prepared the report, present expert opinion evidence and question the chain of evidence. (*Ibid.*) Here, appellant has been given no such opportunity to challenge the technical sufficiency of the report, to cross-examine the technician who prepared the report or to question the chain of evidence. He was simply provided a copy of the laboratory test report along with a notification of purse forfeiture. On appeal, these documents were made part of the record. Neither party offered additional evidence regarding the laboratory results.

14. Business and Professions Code section 19517 governs appeals before CHRB and provides in relevant part:

> (a) The board, upon consideration, may overrule any steward's decision other than a decision to disqualify a horse due to a foul or a riding or driving infraction in a race, if a preponderance of the evidence indicates any of the following:
>
> (1) The steward mistakenly interpreted the law.
> (2) New evidence of a convincing nature is produced.
> (3) The best interests of racing and the state may be better served.

On appeal the burden is on the appellant to prove facts necessary to sustain the appeal. (Cal. Code Regs., tit. 4, § 1764.)

15. Appellant has not offered any evidence on appeal so it cannot be found that "new evidence of a convincing nature" requires reversal of the steward's decision. Nor has he demonstrated that the stewards mistakenly interpreted the law or that the best interest of racing and the state may be better served by overturning the decision. He has therefore failed to prove facts necessary to sustain the appeal.

16. Under *Lavin* and other authority cited above, there was no requirement that the Board of Stewards hold a hearing or make findings prior to issuing the forfeiture order. It is therefore unnecessary to make separate inquiry into whether the record contains substantial evidence to support the Stewards' decision. For the order to issue, CHRB rules only require the existence of an official laboratory report showing a positive test result for the prohibited drug clenbuterol. Such report exists, regardless of its technical sufficiency or ability to withstand authenticity, hearsay or other legal challenges.[6] To require that it be properly authenticated, or to require that a proper foundation be laid in order for it to be admissible non-hearsay evidence, would essentially impose a requirement that the Board of Stewards hold a hearing in every summary disqualification/forfeiture case. *Lavin* holds otherwise. (*Lavin* v. *California Horse Racing Board*, *supra*, 57 Cal.App.4th 263.)

17. It is apparent that appellant was given no opportunity to test the adequacy/ technical sufficiency of the laboratory test results. CHRB contends that it was enough that he was provided notice that the Board's official laboratory had found that the sample contained a prohibited substance, and that once notified appellant had 72 hours to request that the split sample be tested by "an independent Board-approved laboratory." (Cal. Code Regs., tit. 4, § 1859.25(b).) Appellant also had the right to present new evidence before CHRB on appeal.

Whether the above-described process is fair and sufficiently protective of appellant's rights is a question that must be raised in the superior court, not in these administrative proceeding. In this case appellant was provided what limited procedural protections are specified under CHRB laws and regulations governing summary disqualification and purse forfeiture. The validity of these laws and regulations cannot properly be challenged at administrative hearing absent authority for such review in a statute or regulation. (*Tidewater Marine Western, Inc.* v. *Bradshaw* (1996) 14 Cal.4th 557; *Joseph I. Smith, M.D.* v. *Vallejo General Hospital* (1985) 170 Cal.App.3d 450.)

18. In sum, appellant has not established by a preponderance of the evidence any of the criteria set forth in Business and Professions Code section 19517. Specifically, it was not established that the Stewards mistakenly interpreted the law, that new

[6] Accordingly, no consideration of whether the Truesdail letter report is admissible as an exception to the hearsay rule is warranted at this time.

evidence of a convincing nature is produced, or that the best interests of racing and the state may be better served. To the extent that challenges are made to CHRB laws and regulations governing summary disqualification and forfeiture, such issues must be raised in the superior court and not in these proceedings.

ORDER

The Board of Stewards Decision and Notification of Purse Forfeiture, dated April 17, 1999, against Richard Gach, is affirmed.

DATED: _____

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JONATHAN LEW
Administrative Law Judge
Office of Administrative Hearings